No. 14692

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS MANUFACTURING COMPANY; NATIONAL PARTS COMPANY; AND HENRY MEZORI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

PAUL A. SWEENEY,
MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys,
Department of Justice.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 14692

UNITED STATES OF AMERICA, APPELLANT,

v.

NATIONAL WHOLESALERS, A CORPORATION; M-D PARTS MANUFACTURING COMPANY; NATIONAL PARTS COMPANY; AND HENRY MEZORI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

A substantial portion of appellees' brief (pp. 2-5, 22-23) is devoted to a challenge to the personal probity of the counsel representing the Government in this litigation. We do not deem appellees' statements in this connection to be worthy of any response. At the same time, a summary consideration of those portions of appellees' brief which are addressed to the merits of the appeal may serve to clarify the issues before this Court.

1. Appellees assert (Appellees' Brief, pp. 8 *et seq*) that the allegations of the Government's complaint do not set forth the circumstances constituting appellees' fraud with the particularity required by Rule 9(b)

of the Federal Rules of Civil Procedure. Even a cursory examination of the complaint will reveal, however, that it alleges, in abundant detail, every essential element of a cause of action grounded upon fraud. See *Pence* v. *United States,* 316 U. S. 332, 338.

Specifically, the complaint alleges that the Government entered into a contract with appellees which, as appellees were aware, called for the delivery of genuine Delco-Remy regulators (Par. VIII-IX, R. 5-6). Instead of then delivering genuine Delco-Remy regulators, appellees deliberately substituted other and inferior regulators and parts of their own assembly and manufacture (Par. XIII, R. 8).[1] They also clandestinely purchased Delco-Remy nameplates and placed them on the delivered regulators with the intent of inducing the Government into believing that genuine Delco-Remy regulators were being supplied (Par. XIII, R. 8-9). By reason of the foregoing, the certifications in the invoices that all conditions of purchase had been complied with were false, fictitious or fraudulent (Par. XIV, R. 9). The Government made payment to appellees in reliance upon the false claims and was damaged thereby (Par. XV, R. 9).

2. Appellees' contention (Appellees' Brief, p. 8) that the record does not reflect any misrepresentations on their part is equally baseless. First of all, the record shows that appellees expressly represented in their bid both that they would furnish genuine Delco-Remy regulators and that they were a dealer in, not a manufacturer of, regulators (S. R. 294-295). Secondly, by placing a counterfeit Delco-Remy nameplate

---

[1] Contrary to appellees' belief (Appellees' Brief, p. 9), whether one item is inferior to another is a factual matter.

on each of their own regulators prior to its delivery to the Army (R. 33, 183), they implicitly represented that these regulators were of Delco-Remy manufacture. Finally, in each invoice they described and certified the supplied items as being genuine Delco-Remy regulators (R. 103).

It is interesting to note that, while appellees complain of the characterization of their dealings with the Government as dishonest (Appellees' Brief, p. 2), at no place in the brief do they endeavor to explain why they (1) surreptitiously acquired the Delco-Remy nameplates; (2) placed these nameplates on the delivered regulators, which they in fact had assembled themselves; (3) stated in their bid that they were "Bidding DR-1118502" (the genuine Delco-Remy regulator); and (4) carefully avoided the use of the words "or equal" in the preparation of the invoices accompanying the shipment. Instead, appellees seemingly remain content to rest on the excuse (Appellees' Brief, p. 5) that the Delco-Remy regulator is not patented and is manufactured for Army use exclusively.

Even if this is true, it is difficult to see its materiality. This action, of course, is not grounded upon patent infringement. Rather, the gravamen of the complaint is that appellees had supplied to the Army something other than that which they had certified they were supplying (as well as had contracted to deliver) and further that, in doing so, they had concealed the substitution by resort to the device of false labelling.[2]

---

[2] That this is, as we suggested in our main brief (p. 11), a recurring technique of the defrauder is pointed out in a recent article dealing with the subject of the palming off of mislabelled substitutes for items manufactured by concerns with nation-wide reputations. See Frank, *Do You Know What You Are Buying?*, Saturday Evening Post, July 9, 1955, p. 28.

Whether the model DR-1118502 Delco-Remy regulator was patented at the time or not, appellees plainly had no license to engage in such deceit; the obligation of honesty is certainly not restricted to suppliers of patented items.

3. Appellees contend in effect (Appellees' Brief, pp. 15-16) that the District Court's finding that no fraud has been committed by them is not subject to any appellate review whatsoever. In support of this novel and startling proposition, they cite (Appellees' Brief, p. 16) four decisions of the Eighth Circuit. None of these decisions, however, purport to, or indeed could, disturb the force of the provision of Rule 52(a) of the Federal Rules of Civil Procedure that findings of fact "shall not be set aside *unless clearly erroneous*" (emphasis supplied). As set forth in the specifications of error (Appellant's Brief, pp. 9-10), it is the Government's position that the District Court's findings bearing on the question of fraud are "clearly erroneous"; that a review of the entire record will leave "the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Company,* 333 U.S. 364, 395. Cf. *United States* v. *Comstock Extension Mining Co.,* 214 F. 2d 400 (C.A. 9).

Moreover, we think it should be noted that the District Court's ultimate findings in regard to fraud were not founded upon its resolution of conflicting evidence. Instead, as is pointed out in our main brief (pp. 14 *et seq*), underlying these findings was the court's preliminary determination that appellees' contract with the Government permitted the delivery of "or equal" regulators in lieu of Delco-Remy regulators. Questions of contract interpretation, especially where (as here) no

parol evidence is involved, are questions of law and not of fact. *United States* v. *Lundstrom,* 139 F. 2d 792, 795 (C.A. 9).

Appellees do not take issue in their brief with our analysis (Appellant's Brief, pp. 14-16) of the provisions of the contract, which analysis compels the conclusion, we submit, that the contract called for the delivery of Delco-Remy regulators "without substitution of any kind." Nor, we emphasize again, have they ever given any reason respecting why, if they believed that the contract permitted the delivery of "or equal" regulators, they nevertheless went to such considerable lengths to conceal the fact that the supplied regulators were assembled by themselves and contained non-Delco-Remy parts. Similarly, they conveniently ignore Mezori's concession at the trial (R. 270) that the contract called for the same regulators as had been delivered to the Army under a previous contract—which regulators had been of Delco-Remy manufacture.

What appellees fall back on again is the bald assertion (Appellees' Brief, pp. 17-18) that the Contracting Officer "decided" that the 4,086 regulators in issue here complied with the specifications of the contract. As the portion of the Contracting Officer's letter quoted in our main brief (pp. 20-21) shows, however, this assertion is without substance. The Contracting Officer made it perfectly clear in this letter that, in his view, the contract called for Delco-Remy regulators and that the 4,086 regulators had been accepted by the Army, upon tender, in the belief that they were Delco-Remy.

4. Appellees do not, and in light of the holding in *United States ex rel Marcus* v. *Hess,* 317 U.S. 537 (see Appellant's Brief, pp. 27-28) cannot, dispute that the

recovery of the $2,000 statutory forfeiture for each false claim is not dependent upon a showing of actual, ascertainable damage. Thus, as we urge in our main brief (pp. 22-30), the United States was entitled to recover the statutory forfeitures simply on its showing that appellees knowingly substituted their regulators for the Delco-Remy regulator specified in the contract and that they delivered and certified them to the Army as being Delco-Remys. The Government was not obligated to show that appellees' substitute was inferior to the item it was represented to be.

But the Government made such a showing through the testimony of appellees' subcontractors and of an expert witness (see Appellant's Brief, pp. 7-8). Appellees made no effort at trial, by cross-examination or otherwise, to controvert the expert's opinion that the non-Delco-Remy hinges and insulating plates used in appellees' regulators were decidedly inferior to their counterparts in the genuine Delco-Remy. Nor do they advance any such suggestion in this Court.

Appellees' insistence here, as in the court below, is instead (Appellees' Brief, pp. 17-19) that Article 14 of the contract (the "disputes clause") precluded the showing of inferiority. Additionally, they rely on 41 U.S.C. 156 for the same proposition.

The reasons why Article 14 is not applicable are detailed in our main brief (pp. 32-35) and need not be set out again here.[3] And, insofar as 41 U.S.C. 156 is con-

[3] Appellees do not discuss these reasons in their brief. They do quote (Appellees' Brief, p. 20) from a colloquy between the court below and government counsel in which the latter stated that he did not intend to "impeach" the determination of the Contracting Officer. But this hardly assists them. For, the single determination that the Contracting Officer made was that the *balance* of the regulators (which are not in issue here) would be accepted on an

cerned, in terms it attaches finality solely to the determinations and decisions which under the provisions of the Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C. 151-161, are to be made by the agency head. We see nothing in the Act requiring determinations by agency heads in respect to the quality of items delivered under a Government contract. To the contrary, the Act is primarily, if not exclusively, devoted to matters relating to contract procurement.[4]

"or equal" basis, even though the contract specified Delco-Remy regulators (see Appellant's Brief, pp. 20-21, 34). That government counsel did not regard the Contracting Officer's letter as having any bearing upon the regulators previously delivered is seen from his statement to the court, immediately following the quoted colloquy, that he intended to prove that these regulators were defective and inferior (R. 118-119).

[4] The cases cited by appellees on pages 18 and 19 of their brief, with the exception of *Kihlberg, Moorman,* and *Wunderlich* which we treat in our main brief (pp. 32 *et seq*), are not in point. Whatever, for example, may be the finality attaching to determinations by the Secretary of the Interior on matters concerning the administration of public lands (*DeCambra* v. *Rogers,* 189 U. S. 119), contracting officers' determinations are final only if they come within the ambit of the disputes clause. And, even then, there is substantial doubt whether the disputes clause may be invoked in an action for fraud (see Appellant's Brief, p. 35).

Insofar as appellees' complaint regarding the seventh specification of error is concerned, while the court below first excluded the Government's evidence on the composition of the delivered regulators, it later reversed itself and admitted it; although refusing, erroneously we believe, to consider at all the question of inferiority. In the circumstances, we did not believe the second sentence of Rule 18(d) of this Court to be applicable. If we were wrong in this belief, we regret the omission but call the Court's attention to the fact that the information called for by the Rule does appear on pages 7 and 8 of our main brief.

CONCLUSION

For the reasons above stated, and those contained in our main brief, we respectfully submit that the judgment below should be reversed.

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS
United States Attorney.

PAUL A. SWEENEY,

MELVIN RICHTER,

ALAN S. ROSENTHAL,
Attorneys,
Department of Justice.

AUGUST, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 355103 207